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SOME DIFFICULTIES IN ASSURING EQUALITY AND AVOIDING ENDORSEMENT

JESSE H. CHOPER*

I am very happy to be here at Villanova for the first time and particularly pleased to be present to hear Professor Nussbaum's presentation, which was most informative in content and thoroughly delightful in delivery.

Professor Nussbaum's position is that the real meaning of our constitutional traditions with respect to religion and government is securing religious liberty. I fully agree. She believes that two principles should be pursued in order to achieve this. One is assuring equality, and the other is avoiding government endorsement ("announcement of a religious orthodoxy"). Though I accept both of these broad goals, I would suggest several strong qualifications, especially regarding the role of the Supreme Court.

First, Professor Nussbaum's goal of "equal respect," "full equal respect," or "full equality" is both hard to define, and it is problematic as a matter of constitutional policy. Second, difficulties arise in forbidding government endorsement, especially when it does not pose a meaningful threat to religious liberty. Let me illustrate these problems in the context of four actual practices, all of which have been alluded to by Professor Nussbaum and considered by the Supreme Court.

First: The Free Exercise Clause requirement, between 1963 and 1990, of exemptions from generally applicable regulations unless there is a compelling state interest.¹ I agree that the test originally announced in *Sherbert* was right, and that its subsequent repudiation in *Employment Division v. Smith* was wrong.² My position supports the Supreme Court's key role in protecting religious minorities who are not well represented in the political process and therefore often likely either to be deliberately ignored or just overlooked by popularly elected lawmakers or their designees.

Although the *Smith* rule was grounded in equality and neutrality between religion and non-religion, the *Sherbert* test plainly favors religion.³

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1. See *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (using compelling state interest test on religious infringement).

2. See *id.* at 406-09 (applying compelling state interest and finding exemption required); *Employment Div. v. Smith*, 494 U.S. 872 (1990) (holding no exception required for sacramental use of Peyote drug for Native Americans).

3. See *Sherbert*, 374 U.S. at 409 (demanding government exemption for religious differences in most circumstances).

Consider the exemption granted Mrs. Sherbert from the unemployment compensation requirement of accepting "suitable work."⁴ Suppose she simply felt a strong obligation to stay at home with her children on both Saturday and Sunday. Or imagine that Mr. Smith chewed peyote seeds, for which he was prosecuted, simply because he liked the effect.⁵ (Admittedly, this would be a very unlikely situation because chewing peyote is usually nauseating and very unpleasant.)⁶ In either case, persons denied unemployment compensation or prosecuted for using peyote who knew that there was an exemption that applied only to Sabbatarians or Native Americans would justifiably feel that they were getting unequal treatment and that religion was being treated favorably. Indeed, they would reasonably perceive the *Sherbert* rule as governmental support of a religious orthodoxy and see themselves as being in the "out" group. This demonstrates the conflict between preserving liberty for minorities and the endorsement approach.

Second: The matter of whether privately financed religious symbols on public property are impermissible government acknowledgments of religion. Consider the crèche, paid for by the local Roman Catholic Church, displayed on the grand staircase of the Pittsburgh courthouse in *Allegheny County*.⁷ I believe that this should be permitted even though it would favor religion. Indeed, it would favor some religions over others. I concede that this would generate feelings of resentment and outsider status by some people. (I can say that as someone who was raised as an observant Jew.) If I were a legislator, I would probably oppose use of a crèche in this way. But, unlike situations as in *Sherbert* and *Smith*, where persons are subject to penalties or pressures to act contrary to their religious beliefs, I don't believe that allowing the courthouse display is a meaningful interference with religious liberty despite the fact that it causes feelings of "outsider" status.

Similarly, most governmental recognition of Christmas does not produce the meaningful interference with religious liberty that is at the core of both the Free Exercise and Establishment Clauses. Thus, I believe that the Court ordinarily should not reject the benign wishes of the majority to recognize Christmas. The crèche in *Allegheny County* was not displayed in order to disparage non-Christians.⁸ It was simply to satisfy the majority's own felt needs.⁹ It is similar to our National Proclamation of

4. See *id.* at 410 (holding that exemption exists for religious observation of Sabbath).

5. See *Smith*, 494 U.S. at 874 (describing how employees were fired and then denied unemployment benefits for ingestion of peyote).

6. See ADAM GOTTLIEB, PEYOTE AND OTHER PSYCHOACTIVE CACTI 19 (1997) (describing chewed peyote as having extremely bitter taste).

7. See *County of Allegheny v. ACLU*, 492 U.S. 573, 578 (1989) (identifying crèche at issue).

8. See *id.* at 580-81 (identifying celebratory nature of crèche and association with caroling program dedicated to world peace and prisoners of war).

9. See *id.* at 580 (describing crèche as visual representation of Jesus' birth).

Thanksgiving—which means Thanksgiving to God—that should also be permitted.¹⁰ This also applies to closing all public buildings on Christmas, but not on comparable holidays of other religions.¹¹ Even though these laws plainly favor some religions over others and therefore generate “outsider” feelings, they cause no meaningful threat to anyone’s religious liberty and should not be judicially enforceable violations of the separation of church and state.

Other examples are our national motto, “In God We Trust,” and the words “Under God” in the Pledge of Allegiance.¹² I do not believe that these should be held generally invalid. On the other hand, daily recitation of the Pledge of Allegiance in public schools should not be allowed even if there is an excusal provision. That should be unconstitutional because of the peer group pressures on children to participate, even when it may be contrary to their religious beliefs. This is meaningful interference with their religious liberty.

Third: Public subsidy of religion as part of a neutral government program. Although religion should sometimes be favored, as under the *Sherbert* test, sometimes religion should be disfavored. Neither “equality” nor “neutrality” are self-defining concepts. I would hold public subsidy of religion unconstitutional, even when it is included in a broad, neutral government program, such as property tax exemption. Tax exemptions for church property dedicated to sacred purposes—as opposed to, say, accredited parochial schools—should be a violation of the Establishment Clause even though this would treat religion unequally and unfavorably. These exemptions involve a coercive (though indirect) infringement of religious liberty because compulsory taxes would be used to involuntarily support either one’s own religion or, usually even worse, someone else’s.

Consider a hypothetical city council that decides to support all voluntary organizations by paying for their symbols. So, it agrees to buy insignia for the Cancer Society, the 4-H Club, and other such groups. I think that if they also buy crucifixes and Stars of David for religious groups, it should be a violation of the Establishment Clause.

The *Sherbert* decision also highlights the problem of compulsorily raised tax funds being used to support religion. As indicated earlier, under the *rule* of the *Sherbert* case, an exemption might have been required by the Free Exercise Clause because refusing unemployment benefits to Mrs. Sherbert substantially interfered with her religion. Still, the exemption meant that she would receive public funds because of her religion through the coercive, compelled use of taxes. The Establishment Clause should bar this.

10. See 5 U.S.C. § 6103(a) (2006) (declaring Thanksgiving federal holiday).

11. See 5 U.S.C. § 6103(a) (2006) (declaring December 25 federal holiday).

12. See 36 U.S.C. § 302 (2006) (codifying “In God We Trust” as national motto); 4 U.S.C. § 4 (2006) (stating text of Pledge and proper recitation).

Note the further difficulties, if Mrs. Sherbert were given unemployment benefits, for persons who oppose the inclusion of church-related schools in a program of general aid to elementary and secondary education. Just as Mrs. Sherbert would be financially disadvantaged because of her religion if she did not receive benefits, so too would those persons who wish to send their children to church-related schools because of their religion. In both instances, the government requires payment to exercise your religion. In Mrs. Sherbert's case it meant forfeiting unemployment compensation. The same result applies for Roman Catholic or Orthodox Jewish parents, or those of other religions, who believe their faith requires them to send their children to church-related schools. Indeed, because a high percentage of parochial school education is secular, excluding them from general aid programs would appear to disfavor religion whereas granting an exemption to Mrs. Sherbert exclusively on the basis of her religious beliefs would appear to favor religion.

Fourth: The enormous subjectivity in respect to who is the "reasonable observer" or "objective observer" under the endorsement test. Although there are often close questions in constitutional law, the reasonable observer issue seems to be peculiarly troublesome, as is illustrated by the constant division of the Court over it. In *Allegheny County*, the justices split on the crèche in the courthouse, the Christmas tree and the menorah, and the "Salute to Liberty" sign by the mayor. This division, over what Professor Nussbaum herself recognizes as involving "subtle issues of context and perceptions . . . [that] could be decided either way," was repeated in the more recent Ten Commandments cases as well as a number of others. When such uncertainty occurs in the political process, legislators often must guess on the best course of action. They may choose to experiment or to take one step at a time. Thus, if the current stimulus plan doesn't work, President Obama has told us that we will try something else. I doubt anyone has any better advice for him. Regrettably, when the nine justices of the Supreme Court try to identify the "reasonable, objective observer," it often becomes perfectly clear that it means a majority of themselves. This kind of uncertainty, in my judgment, is inconsistent with the principled role required of the Supreme Court in exercising its awesome power of judicial review and telling popularly elected, politically responsible representatives what they can and cannot do.